THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ST. JOSEPH PARISH ST. JOHNS, *Plaintiff*, v. DANA NESSEL, in her official capacity as Attorney General of Michigan, *et al.*, *Defendants*.	No. 1:22-cv-1154 **NOTICE OF SUPPLEMENTAL AUTHORITY**

William R. Bloomfield (P68515)
Catholic Diocese of Lansing
228 N. Walnut Street
Lansing, Michigan 48933
(517) 342-2522
wbloomfield@dioceseoflansing.org

William J. Haun
Lori H. Windham
Nicholas R. Reaves
Brandon L. Winchel*
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC, 20006
Tel.: (202) 955-0095
Fax: (202) 955-0090
whaun@becketlaw.org

* Not a member of the DC Bar; admitted in California. Practice limited to cases in federal court.

Counsel for Plaintiff

Plaintiff St. Joseph Parish ("St. Joseph") writes to notify this Court of a recent U.S. Supreme Court decision that bears on Defendants' pending Motion to Dismiss. *See* PageID.804.

In *303 Creative*, website designer Lorie Smith challenged ("through her business," 303 Creative LLC) Colorado's public accommodation law, alleging that if she were to "enter[] the wedding website business," the law would "force her to create speech she does not believe or endorse." *303 Creative LLC v. Elenis*, No. 21-476, ___ S. Ct. ___, 2023 WL 4277208, at *4, *6 (June 30, 2023). Both the Supreme Court's standing and free speech analyses are relevant to this Court's resolution of Defendants' pending Motion to Dismiss.

First, the Supreme Court confirmed the Tenth Circuit's holding that 303 Creative had standing to bring a pre-enforcement challenge to Colorado's public accommodation law, and it did so on even thinner facts than those present here: 303 Creative had not created any wedding websites, and had not faced any adverse action or threat of investigation. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1172-73 (10th Cir. 2021). Even so, the Tenth Circuit held that 303 Creative was "rightfully wary" of

offering wedding-related services and therefore "may challenge [the public accommodation law] as chilling [her] speech." *Id.* at 1173.

Analyzing the same issues St. Joseph discussed under *SBA List*—including history of enforcement, provisions allowing for public enforcement, and the state's refusal to disavow enforcement—the Tenth Circuit found a credible threat of enforcement. *Compare* PageID.897-923 *with 303 Creative*, 6 F.4th at 1173. Regarding past enforcement, the court found evidence of a single similar case sufficient. *303 Creative*, 6 F.4th at 1173. Regarding the other two factors, the court noted that Colorado law allowed "any (would be) customer" to "file a complaint and initiate a potentially burdensome administrative hearing" and finally that "Colorado decline[d] to disavow future enforcement." *Id.* at 1174. The court also rejected Colorado's argument that "Appellants' fear of prosecution is not credible because it requires the court to speculate about the actions of Appellants' would-be customers," holding instead that the "Appellants' potential liability is inherent in the manner they intend to operate—excluding customers who celebrate same-sex marriages." *Id.* at 1173.

On these facts, the Supreme Court had no trouble also finding standing—and rejecting—the dissent's "chid[ing]" for "deciding a pre-enforcement challenge." *303 Creative*, ___ S. Ct. ___, 2023 WL 4277208, at *13; *id.* at *27 (Sotomayor, J., dissenting) ("Again, Smith's company has never sold a wedding website to any customer."). The Supreme Court, like the Tenth Circuit, pointed to (1) a single example of prior enforcement, (2) the ability of anyone to file a complaint, and (3) Colorado's refusal to disavow enforcement as justifying pre-enforcement standing. *Id.* at *6.

These same factors confirm pre-enforcement standing here, as St. Joseph has argued: Michigan is *currently* enforcing the ELCRA against a Catholic Charities in the Diocese of Lansing, PageID.918-920; Michigan law obligates the Department and Commission to investigate complaints filed by members of the public (as has already happened), PageID.920-921; and Michigan refuses to disavow enforcement, PageID.921-923. What is more—and unlike in *303 Creative*—St. Joseph does not just *intend* to engage in *future* actions that could violate the ELCRA—it is already engaged in conduct that expose it to potential

liability under the ELCRA. *See* PageID.882-883. *303 Creative* confirms St. Joseph's standing here.

Second, *303 Creative* further strengthens St. Joseph's speech and expressive association claim (Count IV). *See* PageID.475-477. In *303 Creative*, the Supreme Court (relying on *Hurley* and *Dale*) affirmed that "no public accommodations law is immune from the demands of the Constitution." *303 Creative*, ___ S. Ct. ___, 2023 WL 4277208, at *10-11. And, "[i]n particular, [that] … public accommodations statutes can sweep too broadly when deployed to compel speech." *Id*. This is the exact argument St. Joseph made in its Second Amended Complaint (also relying on *Hurley* and *Dale*): "[t]he ELCRA, as interpreted by Defendants, would require St. Joseph to speak a message contrary to its beliefs and to associate with others in a way that is contrary to its religious beliefs and message." PageID.476. *303 Creative* therefore confirms St. Joseph's allegations easily clear the motion to dismiss hurdle.

Date: July 13, 2023

Respectfully submitted,

/s/ *William J. Haun*
Lori H. Windham
William J. Haun
Nicholas R. Reaves

Brandon L. Winchel*
The Becket Fund for Religious Liberty
1919 Penn. Ave. NW, Suite 400
Washington, DC 20006
Tel.: (202) 955-0095
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